No. 02-297

In the Supreme Court of the United States

SHANNON T. DOYLE, PETITIONER

v.

HYDRO NUCLEAR SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a job applicant did not engage in protected activity under Section 210(a)(3) of the Energy Reorganization Act of 1974, Pub. L. No. 95-601, § 10, 92 Stat. 2951 (42 U.S.C. 5851), by refusing to sign, as a condition of employment, a pre-employment waiver of liability form that he erroneously believed would require him to waive his statutory right to pursue future claims under Section 210 for illegal blacklisting.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 285 F.3d 243. The decisions of the Secretary of Labor (Pet. App. A29-A37) and the administrative law judge (Pet. App. A38-A44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2002. A petition for rehearing was denied on May 30, 2002 (Pet. App. A26-A28). The petition for a writ of certiorari was filed on August 26, 2002. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 210(a) of the Energy Reorganization Act of 1974 (ERA), added by Act of Nov. 6, 1978, Pub. L. No. 95-601, § 10, 92 Stat. 2951 (codified at 42 U.S.C. 5851(a) (1988)), provides:

> (a) No employer, including a [Nuclear Regulatory] Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this [Act] or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this [Act] or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any

other action to carry out the purposes of this [Act] or the Atomic Energy Act of 1954, as amended.[1]

STATEMENT

1. Section 210 of the Energy Reorganization Act of 1974 (ERA) prohibits employers from discharging or otherwise discriminating against nuclear industry whistleblowers, *i.e.*, employees who engage in specified forms of protected conduct relating to the advancement of nuclear safety. 42 U.S.C. 5851(a) (1988). It thus "encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so." *English* v. *General Elec. Co.*, 496 U.S. 72, 82 (1990).

Although most nuclear safety responsibilities are assigned by law to the Nuclear Regulatory Commission, "enforcement and implementation of [Section] 210 was entrusted by Congress * * * to the Department of Labor." *English*, 496 U.S. at 83 n.6. An employee who believes that he has been illegally discharged or otherwise discriminated against may file a complaint with the Secretary of Labor. 42 U.S.C. 5851(b)(1) (1988). The Department of Labor must investigate the allegation and notify the complainant and respondent of its initial determination as to whether a violation has occurred. 42 U.S.C. 5851(b)(2)(A) (1988). A party dissatisfied with that determination may request a hearing before an administrative law judge (ALJ). 42 U.S.C. 5851(b)(2)(A) (1988). After the hearing, an ALJ issues a recommended decision and forwards it with the record

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[1] Section 210 was amended and renumbered Section 211. Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902, 106 Stat. 3123 (codified at 42 U.S.C. 5851). Section 210 applies to this case because the complaint was filed in 1988. Pet. App. A2.

to the Secretary, who issues a final order. 29 C.F.R. 24.6(a) and (b) (1997).[2] Any person adversely affected or aggrieved by the Secretary's final order may obtain judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1) (1988).

2. In the fall of 1988, respondent Hydro Nuclear Services (Hydro), a company that provided workers to nuclear power plants, recruited petitioner for a short-term position at a plant in Michigan. Pet. App. A3-A4. After petitioner completed pre-employment training and testing, Hydro asked petitioner to sign an "Authorization for Release of Information and Records" allowing Hydro to obtain materials such as employment, military, educational and criminal records from various sources, including previous employers. *Id.* at A4-A5, A40-A41, A52.

Petitioner objected to a single paragraph of the release, which provided:

> I hereby release and discharge [Hydro], their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [sic] of furnishing or receiving such information pursuant to this authorization.

Pet. App. A5. Petitioner signed and returned the release, but only after crossing out the above paragraph.

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[2] After the Secretary's decision on liability in this case, the Department of Labor's Administrative Review Board (ARB) was delegated authority to make final agency decisions for the Secretary. 29 C.F.R. 24.7 and 24.8; 61 Fed. Reg. 19,978 (1996), superseded by 67 Fed. Reg. 64,272 (2002).

Ibid. Petitioner explained to Hydro's Manager of Employee Relations that he had filed a whistleblower complaint against a former employer, and he believed the paragraph would waive his right to file a blacklisting complaint under the ERA based on information that Hydro might receive from his former employer. *Id.* at A5, A41- A42, A54. Hydro refused to hire petitioner because he declined to sign the full release. *Id.* at A5-A6, A41-A42, A54-A55.

3. Petitioner filed a complaint with the Department of Labor, alleging that Hydro violated Section 210 of the ERA by refusing to hire him unless he signed the release. Pet. App. A6, A51-A56. The Department's Wage and Hour Division rejected the claim on the ground that petitioner's refusal to sign the release was not protected activity. *Id.* at A6. After a hearing, the ALJ issued a recommended decision also holding that petitioner had not engaged in protected activity by refusing to sign the unaltered release. *Id.* at A40-A44.

The Secretary rejected the ALJ's recommended decision, holding that Hydro violated the ERA. Pet. App. A29-A37. The Secretary disagreed with "the ALJ's interpretation of the authorization form," *id.* at A31, because, in the Secretary's view, "by signing the form, [petitioner] would have waived his right to file a complaint of illegal blacklisting under the ERA." *Id.* at A31-A32. The Secretary noted that petitioner "is a layman who was not represented by counsel when the dispute over the authorization form took place," and reasoned that the provision "could easily be interpreted as a waiver of his rights under the ERA." *Id.* at A36 n.1. The Secretary concluded that, even though the release was probably unenforceable, a requirement that prospective employees sign such a release violates the ERA because employees who signed the release "may

reasonably believe they have no protection under the ERA and will be afraid to speak out about safety problems." *Id.* at A34.

The Secretary also rejected Hydro's contention that "use of the authorization form in Complainant's case was not a pretext because [Hydro] routinely uses the form for screening all applicants." Pet. App. A36 n.5. The Secretary explained that the issue "is not whether use of the form was a pretext for discrimination for some other impermissible reason. [Hydro's] reason for not hiring Complainant is clear. The only issue is whether that reason is itself a violation of the ERA." *Id.* at A36-A37 n.5. The Secretary concluded that Hydro violated the ERA when it refused to hire [petitioner] because he refused to sign the authorization form unless the release of liability paragraph was deleted." *Id.* at A35.

4. A divided panel of the court of appeals reversed. Pet. App. A1-A25. The panel majority held that petitioner "did not engage in protected activity when he refused to sign the employment application with the release," and therefore petitioner did not establish the first element of a prima facie case of illegal retaliation. *Id.* at A15. The court interpreted the release to not waive claims for illegal blacklisting, but rather as releasing claims only as a "result[] of furnishing or receiving such information pursuant to this authorization." *Id.* at A15 (quoting release).

The court of appeals also reversed the Secretary's decision for a "second, independent reason," holding that petitioner failed to demonstrate that Hydro's "proffered legitimate reasons for refusing to hire him without * * * the release—namely, to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened

temporary employees—were pretextual, as required to impose liability." Pet. App. A17 (footnote omitted). The court reasoned that "the record makes clear that Hydro furnished the authorization to all applicants for temporary positions" and that there was no "evidence to suggest that Hydro treated [petitioner] less favorably because of his exercise of rights purportedly protected under the ERA." *Id.* at A18.

Judge Bright dissented. Pet. App. A22-A25. In his view, the release is facially ambiguous and "can be read to release former employers as well as putative employers from liability" for ERA claims. *Id.* at A22. Judge Bright thus would have upheld the Secretary's decision so that nuclear power employees would not be "compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment." *Ibid.*

ARGUMENT

Petitioner challenges the court of appeals' determination (Pet. App. A15-A17) that petitioner was not engaging in protected activity in refusing to sign Hydro's pre-employment release. That contention does not warrant further review by this Court.

1. Petitioner argues (Pet. 14-16, 20-21) that this Court's review is warranted because the court of appeals improperly upheld the legality of a prospective waiver of substantive employment rights. That is not correct. The court of appeals explicitly held that the waiver at issue did *not* encompass prospective blacklisting or other substantive ERA whistleblower claims. *Id.* at A16-A17 & n.14. Thus, in the court's view,

> [t]he release simply did not purport to waive liability for Hydro's employment decisions or other claims [petitioner] might make under the ERA after

> Hydro received information pursuant to the authorization. It merely released potential claims for privacy infringement.

Id. at A16. The court of appeals' fact-bound view of Hydro's pre-employment form—even if erroneous—does not warrant this Court's review.

2. Petitioner further argues (Pet. 16-19) that the court of appeals erred in focusing on an objective test of whether a release is enforceable and in disregarding an applicant's reasonable construction of the release. Again, that contention misconceives the court of appeals' decision, which found the release *unambiguous* in not purporting to waive substantive employment claims, including blacklisting based on whistleblowing activity. Pet. App. A17 n.14. Given that factual premise, the court of appeals had no occasion to address whether a refusal to sign an ambiguous release that is reasonably understood by the applicant to waive substantive whistleblower rights is protected activity under the ERA.[3]

Petitioner therefore errs in arguing (Pet. 16-20) that the decision below conflicts with the reasoning of *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975). That decision construed the anti-retaliation provision of the Fair Labor Standards Act of 1938, 29 U.S.C. 215(a)(3), on quite different facts as protecting

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[3] The Secretary's decision did address that question because it considered the release to be ambiguous. Given that premise, the Secretary held that Section 210 protects an employee who refuses to sign a release based on a reasonable, good faith belief that the release would waive the employee's rights under the ERA. Pet. App. A30-A31, A33-A34; accord 10 C.F.R. 50.7(f) (NRC regulation prohibiting waivers of ERA rights). Because that question of statutory interpretation was not addressed by the court of appeals, however, there is no occasion for this Court to review the issue.

an employee who protested based on a "*reasonable* belief" that her employer was unlawfully requiring employees to endorse and return to the company back pay checks it had issued to employees at the direction of the Department of Labor. 513 F.2d at 181 (emphasis added). By contrast, the court of appeals did not find in this case that petitioner reasonably construed the release to waive blacklisting claims; indeed, the court of appeals found the release to be unambiguous in not waiving such claims. Pet. App. A17 n.14.[4]

3. Petitioner also asserts (Pet. 24-26) that the decision below conflicts with other court of appeals' decisions that give deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Secretary's decisions construing the scope of protected activity under the ERA. The court of appeals based its decision, however, on its interpretation of the contractual provision at issue, Pet. App. A16, and accordingly saw "no reason to defer to the Secretary on this issue of law involving the construction of a proposed contract rather than construction of a statute." *Id.* at A17 n.14. Indeed, the court's opinion specifically observed that it was required to "pay deference to the Secretary in construing the statutes he is charged with administering." *Id.* at A10 (citing *Chevron*, *supra*).

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[4] The other two decisions relied upon by petitioner (Pet. 21-24) also do not conflict with the decision below. In *Connecticut Light & Power Co.* v. *Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996), the court held that a settlement offer with a facially illegal gag order violated the ERA, and in *Secretary of Labor* v. *Mullins*, 888 F.2d 1448, 1449 n.1 (D.C. Cir. 1989), there was no dispute that the employer violated the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c), by discharging the employee for engaging in a protected work refusal.

4. In any event, this Court's resolution of the contentions raised by petitioner would not afford him relief As an "independent" basis for its decision, the court of appeals found that Hydro had a legitimate non-discriminatory reason for refusing to hire petitioner. Pet. App. A17. Petitioner does not challenge that conclusion as worthy of this Court's attention. Pet. i. Especially in those circumstances, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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